No. 94-259

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

LAWRENCE F. BROWN, M.D.,
Petitioner,
vs.
NATIONAL MEDICAL ENTERPRISES, INC.,
NME HOSPITALS, INC. dba DOCTORS HOSPITAL OF
MONTCLAIR and KEVIN JENKINS, D.O.,
Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal Fourth Appellate District, Division Two

RESPONDENTS' BRIEF IN OPPOSITION

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October 7, 1994

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QUESTIONS PRESENTED

1. Do state court civil discovery procedures and rules of court confer jurisdiction in this Court in this matter;

2. Where Petitioner fails to raise a federal question in the state court, may he do so for the first time before this Court;

3. Does the expiration and non-renewal of an exclusive agreement with a physician to operate a service provided by a hospital violate due process or equal protection provisions of the Fourteenth Amendment of the United States Constitution.

PARTIES

Petitioner

Lawrence F. Brown, M.D., individual.

Respondents

NATIONAL MEDICAL ENTERPRISES, INC., (parent corporation)

NME HOSPITALS, INC. dba DOCTORS HOSPITAL OF MONTCLAIR,

KEVIN JENKINS, D.O., individual.

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RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondents, NATIONAL MEDICAL ENTERPRISES, INC., NME HOSPITALS, INC. dba DOCTORS HOSPITAL OF MONTCLAIR and KEVIN JENKINS, D.O. (hereinafter referred to as "Respondents"), respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioner, Lawrence F. Brown, M.D. (hereinafter referred to as "Petitioner") for the reasons and on the grounds set forth herein.

OPINION BELOW

The opinion and orders below are set forth in the Petition for Writ of Certiorari and are reproduced in the appendix thereto.

JURISDICTION

Neither 28 U.S.C.A. Section 1257(a), nor any other federal statute or law, confers jurisdiction in this case on this honorable Court.

As will be discussed in full herein, no jurisdiction exists because a federal question was not presented or passed on in the state courts. *Hill v. California,* 401 U.S. 797 (1971). In fact, the California courts have complete jurisdiction over the parties and subject matter of the case. *Randall v. Howard,* 67 U.S. 585 (1862).

Furthermore, there was no "state action" by the California Courts in deciding the case based upon long-established state law concerning private contractual relationships. *Webb v. Webb,* 451 U.S. 493 (1981); *Shelley v. Kraemer,* 334 U.S. 1 (1948).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

As will be discussed below, no Constitutional provisions, federal statutes or other federal laws are involved in this matter.

STATEMENT OF THE CASE

Statement of Facts

The pertinent facts in this action are set forth in detail in the Opinion of the California Court of Appeal (reproduced

at Appendix A in the Petition for a Writ of Certiorari[1]), and are adopted by Respondents and incorporated by reference herein.

Briefly, however, the instant action arises from the *expiration* and *non-renewal* of a *two-year* agreement between Petitioner, LAWRENCE F. BROWN, M.D., and Respondent NME HOSPITALS, INC., dba DOCTORS HOSPITAL OF MONTCLAIR (hereinafter referred to as "the Hospital"). On December 1, 1985, Petitioner entered into an agreement with the Hospital under which he was to serve as Director of Radiology and provide radiology services to patients at the Hospital. This Agreement was for a stated term of *two years.*

Petitioner had served as director of the Radiology Department since 1977. During Petitioner's directorship of the Radiology Department from 1977 through 1987, his services were provided on an exclusive basis pursuant to several written agreements, all following almost identical form.

Summary of Arguments

1. **Petitioner Has Failed To Invoke The Jurisdiction Of This Court By Failing To Raise Any Purported Federal Question In The State Court**

It is apparent in the first instance that Petitioner has failed to invoke the jurisdiction of this Court because he did not raise a federal question in the state courts. *Hill v. California*, 401 U.S. 797 (1971).

Since the state court had jurisdiction over the parties and subject matter of this case and it was decided based on long-accepted legal precedent followed by the courts of Califor-

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[1]Hereinafter, the Opinion of the California Court of Appeal will be referred to as "Opinion" and the instant Petition for a Writ of Certiorari will be referred to as "Petition."

nia, the decision should not be disturbed. (*See Randall v. Howard*, 67 U.S. 585 (1862).)

Furthermore, the state courts performed their separate and proper functions in denying Petitioner's "discovery" motion, in setting a time limit for appellate oral argument and in not incorporating Petitioner's proffer of corrections into the Court of Appeal's tentative opinion. *Webb v. Webb*, 451 U.S. 493 (1981).

2. The Decision Below Was Correct

Apart from the lack of jurisdiction in this case, no reason is apparent for review of the decision below. The decision was based upon long-established California law that permits hospitals such as Respondent Hospital to enter into exclusive agreements for the operation of certain hospital services or departments, including the Department of Radiology for the benefit of patient health and safety and the efficient operation of such departments.

ARGUMENTS AND AUTHORITIES: REASONS FOR DENYING THE WRIT

Respondents oppose the Petition for a Writ of Certiorari on the following grounds:

I.

THIS CASE PRESENTS NO ISSUE APPROPRIATE FOR THIS COURT'S EXERCISE OF ITS DISCRETIONARY JURISDICTION

A. No Federal Question Was Raised Below

In order to invoke the jurisdiction of this Court in this action, a federal question must have been raised in the state court. *Hill v. California*, 401 U.S. 797 (1971). As a review of the Petition reveals, no constitutional issues or federal question was raised in the trial court, before the California

Court of Appeal or before the California Supreme Court. That Petitioner now at this late stage raises a Fourteenth Amendment claim and also cites the Health Care Quality Improvement Act of 1986 (at 42 U.S.C.A. Sections 11111-11152), is of no merit or consequence.

In *Hill*, the petitioner argued that the admission into evidence of two pages of his diary which contained what could be interpreted as a confession of a robbery violated the Fifth Amendment of the U.S. Constitution. However, the Constitutional issue was never raised at the criminal trial, nor was it raised, briefed or argued in the California appellate courts.

In affirming the judgment of the California Supreme Court, the U.S. Supreme Court stated:

> "In *Cardinale v. Louisiana*, 394 U.S. 437 (1969) certiorari was granted to consider the constitutionality of a Louisiana statute, but at oral argument it developed that the federal question had never been raised, preserved, or passed upon in the state courts. Relying on a long line of cases, we dismissed for want of jurisdiction. 394 U.S. at 439." *Id.*

In *Webb v. Webb*, 451 U.S. 493 (1981), this Court was faced with a similar assertion by a petitioner of a Constitutional issue where none had been raised below. In *Webb*, just as in the instant matter, the claimed basis of jurisdiction was 28 U.S.C. Section 1257. The *Webb* court stated:

> "As applied to the circumstances of this case, that statute requires that in a state court, petitioner have 'specially set up or claimed under the Constitution . . . of . . . the United States' that right which he now seeks to have this Court enforce. 28 U.S.C. Section 1257(3) [currently, 28 U.S.C. Section 1257(a)]. Similarly our Rule 21.1(h) [currently, Rule 14.1(h)] requires a petitioner to 'specify the stage in the proceedings, both

> in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court.'
>
> . . .
>
> "We note first that nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon. Nor is any federal issue mentioned by the dissenting opinion in that court. This Court has frequently stated that when '*the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, . . .*' (Citations omitted.)" *Id.* at 495-496. (Emphasis added.)

B. There Was No "State Action" By The California Courts

Also without merit are Petitioner's claims that the trial court violated his due process and equal protection rights by denying a motion to compel discovery and that the Court of Appeal did the same by not accepting Petitioner's proffer of corrections to the tentative opinion and by the court's adherence to a fifteen-minute limit on oral argument. By way of these claims, Petitioner asserts some sort of "state action" by the state courts.

With regard to Petitioner's "state action" argument, the *Webb* court is also instructive, as follows:

> "In the first place, although the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes re-

> sponding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements. As the Court has elsewhere observed, this principle of comity requires 'a proper respect *for state functions*, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways.' *Younger v. Harris*, 401 U.S. 37, 44 (1971)." *Id.* at 499-500. (Emphasis added.)

Thus, that the trial court performed its separate function with regard to a motion to compel discovery and the Court of Appeal adhered to its own rules of oral argument and "corrections" to its tentative opinion, does not amount to "state action."

C. The Cases Cited In The Petition and in the Supplemental Brief To The Petition Are Wholly Unrelated To The Facts And Issues In This Case And Do Not Support The Petition

The cases relied on by Petitioner as conferring jurisdiction upon this court, *Shelley v. Kraemer*, 334 U.S. 1 (1948) and *Thompson v. Louisville*, 362 U.S. 199 (1960), are substantively and procedurally unrelated by any stretch of the imagination to the case at hand.

First, in contrast to the facts in *Shelley*, this case does not involve the active enforcement by the state courts of blatantly racially restrictive covenants relating to real property. Second, this case does not involve the issue of insufficiency of evidence in a criminal trial, as was the subject matter of *Thompson*.

Instead, the within case involved a private contractual relationship between a hospital and a doctor with a stated term of two years. The two-year agreement between the parties simply expired pursuant to its terms and was not renewed by the Hospital. There is simply no issue herein which would support invocation of the due process and equal protection provisions of the Fourteenth Amendment of the United States Constitution even if such had been raised before the state court.

As stated in *Shelley*, the distinction between the United States Supreme Court cases which found state action by the state courts and those cases which did not, are those which involved "the active intervention of the state courts, supported by the full panoply of state power," and those "in which the States have made available to such individuals the full corrosive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell." *Shelley*, 334 U.S. at 19. Plainly, the instant action is not such a case.

As noted above, in both the *Shelley* and *Thompson* cases, and in fact all of the cases cited in the Petition, a *federal question was raised by Petitioner in the lower courts*, something which is completely lacking here.

The requirement that a federal question be raised below in order to invoke the jurisdiction of this Court is based upon sound reasoning. As stated by this Court in *Webb*, *supra*:

> "There are also very practical reasons for insisting that federal issues be presented first in the state-court system. The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do

> not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth .... Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our own workload, this is a very substantial matter." *Webb*, 451 U.S. at 500-501.

In Petitioner's Supplemental Brief to the Petition, he cites *Fobbs v. Holy Cross Health System Corp.*, 29 F.3d. 1439 (1994), as having jurisdictional and substantive bearing on the instant case. Once again, Petitioner relies on a case which is wholly inapplicable to the instant action.

In *Fobbs*, the petitioning doctor had his staff privileges summarily suspended by the hospital. In stark contrast, Petitioner's staff privileges were *not* terminated or suspended. Here, Petitioner was under an exclusive contract to serve as Director of Radiology at Respondent Hospital. (*See* C.T. at Vol. IV, 793-829.) Such agreement was for a stated term of *two years*. (C.T. at Vol. IV, 803.) The agreement between Petitioner and Respondent Hospital set forth that Petitioner was an independent contractor, expressly identified the specific term of the agreement, and provided that either party could terminate the agreement without cause on ninety days notice. (C.T. at Vol. IV, 803, ¶ V1B.) Thus, the contract expired pursuant to its own terms. In fact, Petitioner conceded in evidence submitted to the trial court that his privileges as a member of the Hospital's medical staff *were not* affected by the non-renewal of the agreement. (C.T. at Vol. IV, 830-31.)

Another compelling difference between the *Fobbs* case and the within action is that the *Fobbs* petitioner asserted several federal claims in his action and brought the action in federal court. Petitioner herein, however, asserted no federal claims *at all*, but instead, based his claims on California law.

Because Petitioner never raised a federal claim in the state courts, as reflected by the Opinion below, there can be "no state action" herein, and the Petition should be denied for want of jurisdiction.

II.

THE DECISION BELOW IS WELL REASONED AND INVOLVES NO CONFLICT OF OPINION OR OTHER BASIS FOR REVIEW BY THIS COURT

Aside from the lack of jurisdiction, there is no reason for review of the decision below. The decision of the California Court of Appeal was based upon long-established legal authority which allows hospitals, such as Respondent Hospital, to enter into exclusive agreements for the operation of certain hospital services or departments, including the Department of Radiology. (*Centeno v. Roseville Community Hospital*, 107 Cal. App. 3d. 62 (1979); *Lewin v. St. Joseph Hospital of Orange*, 82 Cal. App. 3d. 368 (1978).) The decision of a hospital to enter into an exclusive agreement has been found by each California Court that has considered this issue to be rationally based and have inherent advantages to patient health, safety and convenience, as well as administrative efficiency. (See also, *Mateo — Woodburn v. Fresno Community Hospital & Medical Center*, 221 Cal. App. 3d. 1169 (1990); *Redding v. St. Francis Medical Center*, 208 Cal. App. 3d. 98 (1989); *Blank v. Palo Alto — Stanford Hospital Center*, 234 Cal. App. 2d. 377 (1965).)

Furthermore, this is not a case where a federal question was decided in conflicting ways or where, as Petitioner

argues, "an entire tangle of conflicts appears among the courts of the states." Neither, as the Petitioner argues, is the unpublished opinion precedential.

In emphasizing that the facts of this case do not support Petitioner's arguments, the Court of Appeal stated:

> "Regardless of the spin which plaintiff has attempted to place on the facts, he was not 'terminated'; *his contract expired according to its terms and was not renewed.* In these circumstances, to declare the existence of a duty, fiduciary or otherwise, or a covenant of good faith and fair dealing, would engraft upon the contract, *which had no renewal provision*, a requirement that defendants could not refuse to renew the contract except for good cause. This we decline to do." (Opinion, at Appendix A to Petition, p. 18; emphasis in original.)

Moreover, as noted by the court in its Opinion, the Hospital did not grant Petitioner a "right to make a living" and/or a "right" to have unlimited use of its equipment and facilities, and the fact remains that Petitioner can still exercise his medical staff membership and clinical privileges at Respondent Hospital.

Finally, as to Petitioner's argument that the trial court violated his due process and equal protection rights by denying a motion for discovery, the Court of Appeal was never faced with such an argument by Petitioner; rather, Petitioner's briefs to the California Court of Appeal contained no legal authority whatsoever with regard to that issue. As noted by the Court of Appeal in its Opinion:

> "Plaintiff's Opening Brief includes an argument entitled 'THE NEED FOR DISCOVERY' this argument is apparently addressed to the trial court's denial of plaintiff's motion for a continuance to unable him to conduct further discovery. (Code Civ. Proc., Section 437 subd. (h).) However, the argument consists

only of a three-page exposition of the discovery which plaintiff contends he needs to conduct, and does not include any legal authority whatsoever. Accordingly, we shall treat the issue as waived and shall not consider it. (*Troensgaard v. Silvercrest Industries, Inc.* (1985) 175 Cal. App. 3d. 218, 228.)" (Opinion, at Appendix A to Petition, p. 25, fn.2.)

III.

CONCLUSION AND PRAYER

Respondents pray that this Court deny the instant Petition for Petitioner's failure to raise any jurisdictional basis for review and because the decision below was properly decided based upon well-established state law and case authority.

Dated: September 7, 1994

DUMMIT, FABER & BRIEGLEB

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